

September 1, 2004

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Communication
Nationwide Programmatic Agreement Regarding the Section 106 National Historic
Preservation Act Review Process
WT Docket No. 03-128

Dear Ms. Dortch:

On September 1, 2004, Elizabeth S. Merritt, Deputy General Counsel, and Emily Wadhams, Vice President for Public Policy for the National Trust for Historic Preservation, met with Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, and Frank Stilwell, Attorney-Advisor, Wireless Telecommunications Bureau, regarding the above-referenced proceeding. In addition, Amos Loveday, Cultural Resource Specialist, Wireless Telecommunications Bureau, was connected into the meeting by telephone.

We discussed the National Trust's letter to the Chairman dated August 25, 2004, as well as the letter filed by the National Trust dated May 25, 2004, both of which expressed the Trust's concerns about the overly broad scope of the "industrial/commercial exclusion" in the Nationwide Programmatic Agreement (PA) for implementing Section 106 of the National Historic Preservation Act. We explained that the proposed exclusion could serve as a major loophole that would allow towers with serious impacts on historic properties to go unreviewed.

We also discussed the concept behind the proposed compromise language advanced by the National Trust in our August 25 letter. We explained the basis and rationale for the Trust's proposal, which was designed to accomplish the following:

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- (1) rely on clear, objective, “bright-line” criteria that would not be subject to varying interpretations and judgment calls;
- (2) reassure State Historic Preservation Officers (SHPOs) who might be concerned about the potential for the exclusion to create an overly broad loophole, and thus might be opposed to the agreement;¹ and
- (3) serve as a compromise that could be acceptable to industry groups as a basis for developing a sufficient consensus to complete the process of adopting the PA.

We explained that, in order to design our compromise proposal as one that could be acceptable to industry groups, we developed the details of the proposal in consultation with them, and we made modifications to our proposal in response to industry feedback, before submitting it. (Examples include the proposed square footage limitation, reduced from 100,000 to 80,000, and the proposed tower height, which we raised from 100 feet to 125 in order to accommodate co-location at industry’s suggestion.) We also noted that the record shows no negative response from industry to the Trust’s August 25 proposal.²

With respect to the National Conference of State Historic Preservation Officers (NCSHPO) and the Advisory Council on Historic Preservation (ACHP), we explained that we had shared and discussed our compromise proposal with NCSHPO officials before submitting it, and that we had advised ACHP staff of our intentions prior to submitting the proposed compromise. NCSHPO officials told us that they had no disagreement with the substance of our proposal, though they did not necessarily endorse the strategy of attempting to break the stalemate at this time. ACHP staff preferred not to be involved in reviewing or developing the substance of the proposal, but the staff communicated to us that the ACHP was “more than comfortable” with the FCC responding to and acting on a new proposal from the National Trust.

¹ We also provided to the staff a paper copy of an excerpt from the minutes of a National Conference of State Historic Preservation Officers (NCSHPO) meeting cited in the National Trust’s May 25, 2004 letter, from <http://www.ncshpo.org/PDFs/031004annualmtgfinal.pdf> (pages 4-5). That excerpt from the minutes is attached to this letter. We mentioned in particular the well-known concerns of Jim McConaha, the New Hampshire SHPO, who is identified in the NCSHPO minutes, and has been involved in reviewing a controversial cell tower proposal near Canterbury Shaker Village, a National Historic Landmark District in New Hampshire.

² In our August 25, 2004 letter, we mentioned our understanding that the Cellular Telecommunications and Internet Association (CTIA) had previously opposed modifications to the “industrial/commercial” exclusion, which was based on our review of CTIA’s ex parte statement in the record, dated July 22, 2004. However, the record shows no opposition from CTIA in response to the National Trust’s August 25 proposal. Moreover, other industry representatives have advised us that CTIA does not necessarily speak for all of industry in any event, or even for all of its member companies.

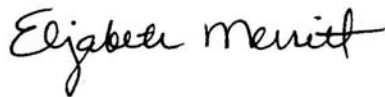
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With respect to the proposed condition that no historic properties could be located within 500 feet of the facility in order to qualify for the exclusion, we explained our intention that this determination would be made by the applicant in conformance with the procedures developed for identifying historic properties subject to visual effects generally. This approach is consistent with our goal of incorporating clear, objective criteria and procedures for applying the exclusion.

We also clarified, in response to questions, that our proposal for the "industrial/commercial" exclusion was not intended to limit or reduce tribal consultation in any way, and that we would defer to the views of the tribes on any issue regarding tribal consultation in the PA.

Please include this letter with the file for this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth Merritt". The signature is fluid and cursive, with the first name "Elizabeth" written in a larger, more prominent script than the last name "Merritt".

Elizabeth S. Merritt
Deputy General Counsel

Enclosure

cc: Jeffrey Steinberg
Frank Stilwell
Amos Loveday

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program. He noted that John Nau was adamant that the \$10 million not come out of the states budgets.

John Fowler discussed Executive Order 13287, which deals with property management and how federal agencies carry out their Preserve America responsibilities. Executive Order 13287 requires each federal agency to designate a Senior Policy Official (SPO) and John Fowler noted that 68 of the 73 agencies have done this. The SPO is a policy-level position and SPOs will oversee the agencies Federal Preservation Officers. He also noted that the Council is working in number of different areas to advance the goals of Preserve America including involvement with the Department of Education, working with the Federal Highway Administration (FHWA) to make transportation enhancement monies available and partnering with the National Endowment for the Humanities on the We the People project.

The Council received over 140 comments regarding the revisions to the Section 106 regulations and they have finished reviewing them. The Council completed a staff recommendation, which was also reviewed by the NCSHPO, and they have upcoming conference call to determine how to proceed with the revisions. There was some discussion about several court cases and John Fowler concluded this discussion by indicating that the Council could not rest on the Sailor Park case and that they are bound by National Mining Association ruling. He further noted that this will be explained in more detail in the final preamble to Section 106 revisions. John Fowler concluded his remarks about the Section 106 revisions by noting that many of the public comments suggested that Adverse Effect determinations have more teeth, so the revisions will attempt to do this without being overly burdensome to the federal agencies.

John Fowler discussed the Federal Communications Commission (FCC) Programmatic Agreement (PA) and noted that the Pombo/Radonovich letter shaped the negotiations. The Council has been working with the NCSHPO to address the issue of visual impacts on properties that are listed or were previously determined eligible. New surveys will not be conducted to determine if there are additional historic properties. However, areas that will be directly impacted by a project will continue to be surveyed. The FCC is poised to act on the PA very soon and the Council presumes that these provisions will address the Pombo/Radonovich letter and will be the basis for getting the PA signed. Nancy Schamu, NCSHPO Executive Director, also clarified the issue of exclusion zones and noted that tower replacements, temporary towers, right-of-way poles, and towers that are less than 200 feet in height located in industrial parks, shopping centers and strip malls will be excluded from Section 106 review because the area has already been compromised unless, however, there are historic properties in close proximity to these zones or the shopping center or strip mall are historic themselves. Ted Sanderson acknowledged that the Executive Director did an extraordinary job of handling the PA. The membership expressed some concern that the NCSHPO may be heading down a slippery slope with this PA in terms of how much leeway is being granted to the FCC and that other federal agencies may seek such agreements. John Fowler noted that the FCC is unique because they do not always have a specific site for a tower location; they just need coverage in designated areas, unlike other federal agencies whose project sites are specific. Ted Sanderson

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added that the original intent of the National Historic Preservation Act was to stop the damage caused by very large projects, and questioned if the membership really wants to get involved in projects that have minor federal involvement. He concluded by noting that the FCC intends to set up a website that will record the tower applications, so the SHPOs will be aware of where new towers are going up. John Fowler also noted that there is a provision in the PA requiring that it be reexamined after one year.

Jim McConaha requested that the NCSHPO provide a briefing paper on the FCC PA to the membership and also asked if the membership would be allowed to review the PA before the NCSHPO signs it. A lengthy discussion regarding the review of the PA prior to signing followed and Ted Sanderson noted that, based on all of the time put in and discussions held by the NCSHPO staff and the Board of Directors, it would reflect negatively if the NCSHPO did not sign the PA and that the membership has two options SHPOs could either lose the capacity to conduct surveys in the PA or lose much more if the NHPA were to be amended and, thus, the PA is a good compromise. The membership discussed how decisions are made a Board of Directors is elected to act on behalf of the membership. Wilson Martin suggested that a motion be made to reflect that the Board is responsible for making decisions on behalf of membership. This motion was subsequently amended by Wilson Martin to state that prior to a decision by the NCSHPO President to sign the FCC PA, a copy of the PA will be distributed to the membership, and the Board will then conduct a conference call to discuss the PA and to determine if the membership is satisfied with the PA. Jay D. Vogt seconded. Ted Sanderson added that the FCC must be made aware that the NCSHPO will follow their own internal process for informing the membership prior to signing the PA. The membership unanimously voted in favor of this motion.

Remarks of Janet Synder Matthews, Associate Director, National Park Service (NPS)

Janet Matthews discussed her recent presentation at the National Housing Rehabilitation Association conference and stressed the importance of private investment in historic resources.

Remarks of Susan West Montgomery, President, Preservation Action (PA)

Susan West Montgomery reported on the Hill visits undertaken by NCSHPO and PA members during their time in Washington, D.C. and remarked that historic preservation is one of the most optimistic endeavors and this was clearly conveyed to the members of Congress who were visited. Ted Sanderson concluded by thanking PA and their Board of Directors for all of their support.

Remarks of Bambi Kraus, President, National Association of Tribal Historic Preservation Officers (NATHPO)

Bambi Kraus thanked the NCSHPO and individual states for their support on various tribal issues. She indicated that funding continues to be their top priority the average award to a THPO was \$64thousand - but noted that when the NATHPO lobbies, they do not suggest that money be taken from the states. Bambi Kraus concluded her report by noting that the NATHPO is working with the Council to establish a tribal advisory board and that the NATHPO has recently hired a contractor, Sherry Hutt, to do a best practices guide to tribal consultation.